NO. 46139-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

TRAVIS JEFFREY PARDUE,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE GORDON L. GODFREY, JUDGE

BRIEF OF RESPONDENT

GERALD R. FULLER
Interim Prosecuting Attorney
for Grays Harbor County

Gerald R Fuller
WSBA #5143

OFFICE AND POST OFFICE ADDRESS
County Courthouse
102 W. Broadway, Rm. 102
Montesano, Washington 98563
Telephone: (360) 249-3951

TABLE

Table of Contents

TABLE OF AUTHORITIES

Cases

Rules

RESPONDENT'S COUNTER STATEMENT OF THE CASE

On August 8, 2013, Tom Sweatman lived with his family at 820 Franklin Street in the City of Cosmopolis, Grays Harbor County, Washington. (RP 29). During the day of August 8, 2014, he was at work. His wife and family, including his daughter Christy, and father-in-law, Robert Sevey, were on a trip in San Diego. (RP 30-31). Mr. Sevey's house is located on Cowper Street, approximately 200 yards away from the Sweatman residence. (RP 30). Mr. Sweatman was basically in charge of his home and Mr. Sevey's home during their absence. (RP 31).

Mr. Sweatman arrived home about 4:00 p.m. to 4:30 p.m. on August 8, 2013. (RP 33). When he parked his vehicle, he noticed a Jeep parked near the house that he did not recognize. (RP 35-36). Mr. Sweatman walked to the front door to examine some packages that had been left at the house. He looked through the front window and saw that the back sliding door was open. (RP 36). As he was at the front door looking at his packages, he heard a loud "thump, thump, thump" going across the back deck of his house and realized that someone must have been in his house. (RP 37). He tried the front door and found that it was locked. He had left it unlocked when he went to work that morning. (RP 37).

Mr. Sweatman ran around the house toward Cowper Street and saw two individuals running toward the Jeep that he had seen there earlier. He yelled at them to "Hold it." The vehicle started up and drove off. Mr. Sweatman got in his vehicle and gave chase. (RP 39). As he drove by Mr. Sevey's house, he noticed that the garage door was open. (RP 39-40).

What followed was a pursuit through the City of Cosmopolis, down the Blue Slough Road to Highway 107 to Montesano and eventually out Highway 12 heading East toward Olympia. (RP 45-53). Mr. Sweatman managed to memorize the license plate of the vehicle and identified the vehicle at trial. (RP 49). At one point, he drove right up along-side the vehicle and got a good look at the driver. (RP 50). He observed that the driver and his passenger were wearing white gloves. (RP 50). At one point, the gloves were thrown out of the vehicle along with another item that he described as being purple or bluish in color. (RP 51-52). Mr. Sweatman identified the defendant as the driver of the Jeep. (RP 56).

Following the pursuit, Mr. Sweatman went back to his residence and contacted Chief Stratton. He found that his house and Mr. Sevey's house had been burglarized and ransacked. (RP 54-55).

Investigation revealed that the Jeep motor vehicle was owned by Deena Lincoln. She had loaned the vehicle to a man named Rom Drittenbas on August 7, 2013. (RP 90-91). He returned the car. The car and the spare key turned up missing on the morning of August 8, 2013. Ms. Lincoln verified that she was acquainted with the defendant and knew him to be a friend of Mr. Drittenbas, having seen them together on previous occasions. (RP 89).

Deputy Chief Layman of the Cosmopolis Police Department drove out the Blue Slough Road in an attempt to locate the items that the defendant had thrown from the Jeep. (RP 100-101). He found latex gloves on the shoulder of the Blue Slough Road as well as a purple Crown Royal bag. (RP 101-102). The gloves were examined for fingerprints without success. (RP 123-124). A DNA profile was found on the latex gloves, the major component of which matched the DNA profile of the defendant. (RP 132-133). The expert witness testified that the probability for matching somebody at random, unrelated to the defendant, in the U.S. population was one of 5 sextillion. (RP 133-134).

As it turns out, also, the defendant had previously dated Mr. Sweatman's daughter, Christy. (RP 148). At about 11:00 a.m., on the morning of August 8, 2013, Ms. Sweatman was with her family in San

Diego when she received a phone call from the defendant who was "very upset and said that he needed me and that he wanted to be with me." (RP 149). The defendant told her that he was going to leave a note for her in her car and that he and his friend "Rom" were going to Ocean Shores. (RP 149). Ms. Sweatman told the defendant that she was in San Diego with her mother, her sister and her grandfather. The defendant told her that he wanted to leave a note but that he didn't want to run into her father. Ms. Sweatman told the defendant that her father would be working in the woods and wouldn't be home until late. (RP 149-150). She also explained to investigators that the defendant had been to the Sweatman residence on one prior occasion. (RP 151-152).

The defendant was later arrested and interviewed by Detective Lindros of the Olympia Police Department. He denied committing the burglaries or calling Ms. Sweatman on the date of the burglary. He did recall, however, telling her at one point, that he was trying to "catch a ride with some buddies" that were going to Ocean Shores and that if he could, he would stop by and drop off a love note at her house. He told Detective Lindros that he couldn't believe that Ms. Sweatman would point the finger at him for something like this. He explained that he had been in Ms.

Lincoln's car previously and kept rubber gloves in Ms. Lincoln's vehicle. (Ex 32).

The defendant called several witnesses in support of his claim that he was in Olympia at the time of the burglary. Christine Krenik testified that the defendant was at her residence on August 8, 2013. (RP 190). She stated that the defendant had come to the house earlier in the day to visit his children. (RP 188).

> Q. Okay. Now, what was he doing there?
> A. He was visiting his daughters. It was – we were – can you say this? We were having his daughter's birthday that day so he came over to see them before the party because he couldn't – he can't go out to my brothers because him and my sister don't get along and there is a restraining order with my daughters so…

Ms. Krenik at first said she left her house at 2:00 p.m. – 3:00 p.m. and later claimed, after checking with others, to have left at 3:30 p.m. The defendant remained at her house. Ms. Krenik stated that she was gone until about 6:00 p.m. or 6:30 p.m. When she arrived home, the defendant was not there. (RP 191).

Eleanor Sellness testified that the child's birthday was actually on July 27th but that they were celebrating it on August 8th. (RP 204). She thought that they had left around 3:30 p.m. to go to the party. She could

not account for the defendant's conduct after that time. (RP 205). The defendant was gone when she returned home. (RP 206). She explained that there were no formal invitations but that the party was just organized by word of mouth. (RP 209).

Janessa Sparks testified that she dropped the defendant off at the grandmother's house shortly before lunch to visit the children. (RP 215). She claimed to be aware that there was a birthday party scheduled for that day. (RP 215). She alleged that she picked the defendant up at the grandmother's house around 4:30 p.m. and was with him for the rest of the afternoon. (RP 217). She acknowledged that she took the defendant to visit his children several times a week and that she had earlier neglected to tell police investigators that there had been a birthday party that day. (RP 220).

Procedural Background

The defendant was charged by Information on November 6, 2013, with two counts of Residential Burglary. (CP 1-3). The matter was tried to a jury on March 11-12, 2014. The defendant was found guilty of the burglary of the Sweatman residence and not guilty of the burglary of the Sevey residence. (CP 20, 21).

RESPONSE TO ASSIGNMENTS OF ERROR

Trial counsel provided effective assistance to the defendant regarding alleged invocation of right to counsel. (Response to assignments of error 1, 2, 3)

To establish ineffective assistance of counsel, the defendant must demonstrate that his attorney's performance was deficient and the deficiency prejudiced the defendant. Strickland v. Washington, 466 U.S. 668, 687, 104 Sup. Ct. 2052, 80 L.Ed.2d 674 (1984). Performance is deficient if it falls "below an objective standard of reasonableness based on consideration of all the circumstances." State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

The defendant agreed to a taped interview with Detective Lindros of the Olympia Police Department. At the beginning of the interview, he was advised of Miranda and agreed to speak to the officer. (Ex 32, p. 3):

> LINDROS: Alright. The uh, go ahead and state and spell your full name for me.
> PARDUE: Travis Jeffrey Pardue. T r a v i s J e f f r e y P a r d u e.
> LINDROS: Uh, date of birth.
> PARDUE: 08-28-1986
> LINDROS: Address and phone number.

PARDUE: I'm I'm homeless and don't have a phone.
LINDROS: Homeless and no phone.
PARDUE: Yeah.
LINDROS: Alright and honestly if I can get your, you got a pretty deep voice so, uh, I need you to just talk a little louder inaudible.
PARDUE: Inaudible
LINDROS: Inaudible
LINDROS: That's what I am sayin. I got to read you your rights and I'll throw it out there man and if you don't want to talk you don't have to talk. I at least got to read you your rights at first and then I will let you know what we got here.
PARDUE: Alright.
LINDROS: Alright. You have the right to remain silent, anything you say can and will be used against you in the court of law. You have a right at this time to an attorney if you don't refuse it and have him or her present for any questioning or making any statements. If you cannot afford an attorney, and chose to have one appointed to you by the court without cost and have him or her present for any questioning or making any statements. You have the right to exercise the above rights at any time before any questioning or making any statements. Do you understand each of the rights as I have explained them to you?
PARDUE: Uh huh.
LINDROS: O.k. Having these rights in mind, do you want to talk to me about this Cosmopolis thing once I explain it to you?
PARDUE: Ya. Explain it to me and then I will talk.

During the course of the interview, Detective Lindros asked the defendant about his ex-girlfriend, Christy Sweatman, the daughter of the victim of the burglary. The conversation went as follows:

> PARDUE: She's I mean she has been acting really funny every time I talk to her like you know blah, blah this and this and that and the other thing. I'm just like okay. I kind of heard through the grapevine that something like that happened but I never thought that she would point the finger at me for something like that.
> LINDROS: I mean you guys uh,
> PARDUE: Like mind over matter.
> LINDROS: Inaudible that she would want to do something like that to you?
> PARDUE: Yeah. Probably. Like me and her were really close and everything and then we kind of did drugs together and like that and then she started taking it too far inaudible and I didn't want to contribute to her habit anymore and keep getting her strung out and she lost her job and everything and then she would fuckin call my hookups and have people deliver drugs out to her and shit like that and
> LINDROS: Is she still using that you know of?
> PARDUE: That I know of? Yeah.
> LINDROS: Okay. Has she ever done anything that would lead you to believe that this is fake or that she made it up or that she may have done some of this stuff to get dope or anything like that? I mean, I you didn't know for a long, long time but do you know her to be doing anything to be involved in anything like that?

> PARDUE: Before I make a statement like that I probably should have a lawyer present because I don't want I am not the type of person that will get anybody in trouble for anything or myself in
> LINDROS: You don't got to talk about her. I don't care. I just didn't want inaudible.
> PARDUE: I've known her to go to her parent's house... you know and take money or whatever... (Ex 32, p. 11).

The essence of the defendant's statement was that he probably should have a lawyer present if he was going to start making statements accusing Ms. Sweatman of lying or being involved in the burglary. He was simply pointing out that he wasn't going to implicate Ms. Sweatman. He was not invoking his right to remain silent. He did not say, "I want a lawyer here, now." He did not ask to terminate the interview. At best, the defendant's remarks about a lawyer were equivocal. His remarks certainly did not imply, or could not be taken to imply, that he invoked his right to remain silent regarding his involvement in this matter or that he had something to hide about his involvement and thus invoked his right to remain silent.

Detective Lindros understood the context in which the defendant was speaking about a lawyer. The defendant said he might want a lawyer present if he was going to start talking further about Ms. Sweatman's drug usage and accusing her of being involved in the burglary. The officer had

no obligation to clarify the ambiguous remark. Davis v. U.S., 512 U.S. 452, 129 L.Ed.2d 362, 114 Sup. Ct. 2350 (1994); State v. Radcliffe, 164 Wn.2d 200, 194 P.3d 250 (2008). This statement was never referred to again at trial, let alone used as evidence of the defendant's guilt.

In short, there was no error in allowing the remarks of the defendant regarding the lawyer. Defense counsel was not deficient in this regard. There was no inference of guilt of any kind arising from this remark by the defendant.

The defense counsel did not improperly stipulate to inadmissible evidence. (Response to assignment of error 4)

The defendant alleges that defense counsel improperly raised the issue of the existence of a No-Contact Order. This information first came out inadvertently through no fault of defense counsel. The witness, Christine Krenik, volunteered this information without having been asked (RP 188):

> Q. Okay. And so how long have you known him:
> A. I don't know. Since he was about 15.
> Q. Okay. Okay. Fair. Okay. Now, on August 8, do you – what – was Travis Pardue at your house:
> A. Yes.
> Q. Okay. Now, what was he doing there?
> A. He was visiting his daughters. It was – we were – can I say this? We were having his daughter's birthday that day so he came

over to see them before the party because he couldn't – he can't go out to my brother's because him and my sister don't get along and there's a restraining order with my daughter so...
Q. Okay. So he basically went over there to spend time with his children?
A. Yes.

It's hard to know how defense counsel can be blamed for such an unsolicited answer. The question was simply, "What was he doing there?" The answer went well beyond the question asked. Once the information came out, it was not unreasonable to try and clarify it and explain why the defendant was left at her house. (RP 211).

Even if this were error, there is no reasonable probability that the outcome would have been materially affected. State v. Thomas, 150 Wn.2d 821, 83 P.3d 970 (2004).

This assignment of error must be denied.

Defense counsel properly stipulated to the admission of the taped interview of the defendant. (Response to assignment of error 5)

The tape recorded statement of the defendant was admissible as his admission pursuant to ER 801(d)(2). In the course of the interview, the defendant was told that he was being accused of a burglary. When asked about his criminal history, he denies any involvement with drugs and says

that the only problem he has had is domestic problems with his ex-girlfriend, "Just no contact orders."

In this context, this is not improper. This is the defendant's explanation that he doesn't have any criminal history, he is not a burglar and he doesn't do drugs. This is his explanation about why he could not have done this particular burglary. The sum and substance of his remarks to the officer are set forth below.

> LINDROS: Yeah. It says there was a burg that happened so let's let's start here.
> PARDUE: I don't ever do any of that stuff man.
> LINDROS: What, what is your history: Are you like narcotics?
> PARDUE: No. I just do like a whole bunch of domestic violence, uh, situations with me and my ex and that's about it. Just No Contact Orders.
> LINDROS: Do you know inaudible that?
> PARDUE: No.
> LINDROS: So, no.
> PARDUE: I mean I've done shit like that, you know but
> LINDROS: Inaudible. No property crimes, no thefts?
> PARDUE: No. I, I, I don't do that.

Under these circumstances, it's part of his denial of the crime. In this context, with this minimal admission, it is understandable why counsel for the defendant might not object to it. Indeed, it might very well be strategic to admit, "I have my problems, but I would never do a burglary."

During the course of the interview, the officer suggested that the gloves tossed from the Jeep were going to come back with fingerprints. The defendant responded:

> Well, that's fine. There are rubber gloves in her car with prints on them that are mine. I use the rubber gloves for when I shoot f***ing Heroin and Meth.

The interrogating officer did not ask for this response. This was the defendant's explanation for why his fingerprints (and ultimately his DNA) might be found on the gloves. He'd been in the car with the gloves. He used the gloves. The gloves may have been in the car that day, but he was not.

This testimony was not offered to show propensity. It was simply the defendant's explanation concerning how his fingerprints might be found on the gloves. Admission of the statements of the defendant in this regard is not improper.

In any event, these statements in the context of the entire case are harmless beyond any doubt. The defendant was identified by the victim. The defendant's DNA was found on the gloves. The defendant was connected to "Rom" who had "borrowed" Deena Lincoln's vehicle. The defendant spoke on the phone with Christy Sweatman on the morning of

the burglary saying that he was going to go to the Sweatman residence. There was overwhelming evidence of guilt.

The alleged error, if any, is harmless Thomas, supra, 150 Wn.2d at p. 871. This assignment of error must be denied.

The State did not commit prosecutorial misconduct during final argument. (Response to assignments of error 6, 7, 8)

The State's argument was not improper. The State's argument on this matter was very limited. There was no extended argument about the failure of the defendant to present testimony. The portion of the argument the defendant objects to is set forth below (RP 241).

> Now, you heard from his – the mother, the grandmother and great grandmother of his children and you heard from his girlfriend. Okay. And here they are – I don't – it's unfortunate for them, because six months later they're being asked to reconstruct something that happened and to be honest okay. And the child's birthday was the 27th of July but, oh, gee, it was on this Thursday, August 8th, I know that.
>
> Now, I – I didn't see a party invitation, I didn't see a calendar where a date was written and I didn't see a – Patty or whoever else was at the party or, if they're certain that it was the 8th and they're certain that they left at 3:30 – around 3:30 well, we all have been to Olympia, you know the distance and time we know that Mr. Pardue got there, you know.

First of all, the reference to the party invitation and the calendar was not a comment on the failure to produce evidence. It was a comment on the testimony of Christine Krenik who said there were no party invitations and that everything was by word of mouth. The State may certainly argue about evidence that the witness says doesn't exist.

These facts, plus the fact that the party was allegedly more than two weeks after the child's birthday, and the fact that the witnesses were being asked to provide an alibi six months after the event, all add up to reasons why the jury might be very skeptical about the defendant's alibi. This is combined with the fact that one of the witnesses who did testify first said they left for the party between 2:00 p.m. and 3:00 p.m. and later insisted that they left at 3:30 p.m. The State's argument legitimately attacked the credibility of the alibi witnesses and their opportunity to recall events that happened six months earlier.

Futhermore, the one single reference to others at the party ("I didn't see a – Patty or whoever else was at the party, or if they're certain that it was the 8th...)" was not misconduct. State v. Barrow, 60 Wn.App 869, 809 P.2d 209 (1991). In Barrow, the defendant advanced a theory that tended to exculpate him. It involved a claim that he had stolen the drug pipe from his brother and wasn't aware that cocaine residue was in

the pipe. The brother was never called as a witness. The prosecutor in Barrow repeatedly asked "Where is the brother?" In the case at hand, there was the one single remark made during final argument.

As pointed out by the court in Barrow, 60 Wn.App. at p. 872:

> When a defendant advances a theory exculpating him, the theory is not immunized from attack. On the contrary, the evidence supporting a defendant's theory of the case is subject to the same searching examination as the State's evidence. The prosecutor may comment on the defendant's failure to call a witness so long as it is clear that the defendant was able to produce the witness and the defendant's testimony unequivocally implies the uncalled witness' ability to corroborate his theory of the case.

In the case at hand, there were others at the party, all friends and family of Ms. Krenik, who could have verified the date and time of the party. They were never called. Their testimony would have been critical. Ms. Sellness had to be reminded by Ms. Krenik that they left for the party later than she originally thought. If they left as early as 2:00 p.m. – 3:00 p.m., there would have been plenty of time for the defendant to drive to Cosmopolis. The testimony of Patty who threw the party, would have been critical. See also State v. Blair, 117 Wn.2d 479, 484-485, 816 P.2d 718 (1991); State v. Contreras, 57 Wn.App. 471, 476, 788 P.2d 1114 (1990).

In any event, a defendant who alleges prosecutorial misconduct must establish that the prosecutor's conduct was both improper and prejudicial. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

> Prejudice is established only if there is a substantial likelihood that the conduct affected the jury's verdict... A defendant who does not make a timely objection waives review unless the prosecutorial misconduct is "So flagrant and ill-intentioned that no curative instruction could have obviated the prejudice endangered by the misconduct." State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

In the case at hand, the State did not comment on the failure to call witnesses by the defendant. The State made a single comment on the state of the evidence before the jury i.e.: that the jury only heard from two of the people who were at the party, that the witnesses were asked to recreate an event six months after the fact and explain why, if the child's birthday was on July 27th, the party was on August 8th or, to explain how they could be so certain of the time that they left the house to go to the party.

Defendant's reference to In re Glasmann, 175 Wn.2d 696, 286 P.3d 673 (2013) to suggest that the prosecution in the case at hand deliberately engaged in the type of egregious conduct cited in Glasmann is a total misrepresentation of the record herein.

This assignment of error must be denied.

CONCLUSION

For the reasons set forth, the conviction must be affirmed.

DATED this 17 day of October, 2014.

Respectfully Submitted,

By: Gerald R Fuller
GERALD R. FULLER
Interim Prosecuting Attorney
WSBA # 5143

GRF/ws

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, v. TRAVIS JEFFREY PARDUE, Appellant.	No.: 46139-1-II **DECLARATION OF MAILING**

DECLARATION

I, Sarah L. Wisdom, hereby declare as follows:

On the 17th day of October, 2014, I mailed a copy of the Brief of Respondent to Backlund & Mistry, P.O. Box 6490, Olympia, WA 98507 by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 17th day of October, 2014, in Montesano, Washington.

Sarah L Wisdom

PROSECUTING ATTORNEY
GRAYS HARBOR COUNTY COURTHOUSE
102 WEST BROADWAY, ROOM 102
MONTESANO, WA 98563
(360) 249-3951 FAX 249-6064